Supreme Court, U.S.
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No. 92- 100

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JERRY D. WOODS

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

THE PETITION FOR WRIT OF CERTIORARI

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June 30, 1992

QUESTION PRESENTED

Whether the district court abused its discretion by *sua sponte* dismissing the petitioner's case with prejudice, pursuant to Rule 41(b), Federal Rules of Civil Procedure, without first considering less harsh alternative sanctions when the petitioner did not demonstrate contumacious conduct when both parties had asked the trial court to dismiss *without* prejudice.

LIST OF PARTIES

The parties to the proceedings below were Mr. Jerry Woods, the petitioner, and Union Pacific Railroad Company, the respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

This case was dismissed with prejudice by the United States District Court for the Western District of Missouri, Western Division (D.C. Civil Number 89-1144).

The district court's order was affirmed by the United States Court of Appeals for the Eighth Circuit (Number 91-1556).

RULE INVOLVED

Rule 41(b), Federal Rules of Civil Procedure.

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.... Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

JURISDICTIONAL GROUNDS

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and is sought after the denial of a petition for rehearing. The petition for rehearing was denied April 3, 1992 by the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

On December 8, 1989, the petitioner, Jerry Woods, filed a complaint in the United States District Court for the Western District of Missouri, under Title VII of the Civil Rights Act of 1964. Mr. Woods alleged that he had been wrongfully discharged by his employer on the basis of racial discrimination. Mr. Woods was proceeding *pro se*.

On May 23, 1990 Mr. Woods answered Union Pacific Railroad Company's initial interrogatories. On September 11, 1990 and

on October 23, 1990, Mr. Woods moved for an extension of time in which to complete discovery. Both of these motions were denied. On August 27, 1990 and on October 17, 1990, Mr. Woods was deposed.

On November 9, 1990, two attorneys, Charles A. Dixon and Hartzell J. Whyte, filed their motion to appear *pro haec vice* on behalf of Mr. Woods. Local counsel, James Green, entered his appearance on November 13, 1990. Mr. Woods filed a third motion for an extension of time in which to complete discovery. This motion was granted on December 12, 1990. The district court extended discovery to January 15, 1991.

On December 17, 1990, Mr. Woods propounded the Plaintiff's First Set of Interrogatories to Defendant. On December 27, 1990, the depositions of Robert Naro and Edward Caylor were taken by Mr. Woods's

attorneys. A second set of interrogatories and a request for production of documents was mailed to the defendant's attorney on January 15, 1991. The defendants filed a motion to quash which was granted.

On January 28, 1991, Mr. Woods's attorneys filed a motion to withdraw. (The disposition of that motion is not reflected on the docket.)

The case was set for trial on February 13, 1991. Mr. Woods was represented by new counsel, Ronald K. Barker. Mr. Barker appeared and moved that the case be dismissed without prejudice. Counsel for Union Pacific Railroad Company, Jay Nadlman, at first stated that he was opposed to dismissal. Mr. Nadlman later asked the court to dismiss *without* prejudice. Union Pacific never asked that the case be dismissed with prejudice.

On the same day, the trial court entered its order dismissing the case with prejudice. Despite the fact that all needed depositions had been taken, the trial court's order stated that virtually no discovery had been completed and that Mr. Woods was not prepared for trial. The United States Court of Appeals for the Eighth Circuit affirmed the dismissal with prejudice, finding no abuse of the trial court's discretion. Mr. Woods's Motion for Rehearing was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Mr. Woods's petition for *certiorari* should be granted, the judgment vacated, and his case remanded. The district court's order of dismissal with prejudice is a complete departure from the legal standards which must be met before a trial court can exercise its discretion under

Rule 41(b), Federal Rules of Civil Procedure. The trial judge granted a dismissal with prejudice when neither party ever sought such an adjudication upon the merits. Only the plaintiff sought a dismissal, and he, of course, wanted one without prejudice. This is the first case reported in the Federal Supplement and the Federal Reporter, First and Second Series, in which such a dismissal was made under these circumstances.

The sole issue in this case is whether the district court abused its discretion when it dismissed Mr. Woods's case with prejudice. Mr. Woods concedes that a district court has the power to order *sua sponte* a case dismissed with prejudice. Mr. Woods does not concede that this power may be exercised with unfettered discretion. The district court abused its discretion when it failed to adhere to the

applicable legal standard and ignored the requests of all parties to the action.

Before a litigant can be subjected to the drastic sanction of dismissal with prejudice, he must demonstrate a course of intentional delay or contumacious conduct. *Brown v. Frey*, 806 F.2d 801, 804 (8th Cir. 1986). Such conduct, if it exists, is balanced against the court's need to manage its docket. A district court should consider four factors in determining whether dismissal is proper under Rule 41(b). These factors are:

(1) the degree of personal responsibility on the part of the plaintiff,

(2) the amount of prejudice to the defendant caused by the delay,

(3) any history of deliberately proceeding in a dilatory fashion, and

(4) whether the district court considered sanctions less drastic than dismissal. *McCargo v. Hedrick*, 545 F. 2d 393, 396 (4th Cir. 1976).

An examination of these factors in this case clearly demonstrates that the district court abused its discretion in dismissing Mr. Woods's case with prejudice. First, there is no indication that Mr. Woods's attorneys were responsible for any delay in this case. Mr. Woods must bear the responsibility for any alleged delay. As will be discussed later, however, the record does not support a finding of intentional delay or contumacious conduct by Mr. Woods.

Second, the Union Pacific Railroad Company was not prejudiced by any delay in this case. At the scheduled trial time, counsel for Union Pacific opposed Mr.

Woods's motion for dismissal without prejudice. At no time, however, did Union Pacific seek dismissal with prejudice. Counsel did suggest that if the court chose to dismiss, then Mr. Woods should be responsible for Union Pacific's costs and expenses. In essence, Union Pacific suggested that lesser sanctions be employed. Counsel for Union Pacific estimated that he had spent 100 hours and $2,000 in costs. Counsel declared that "[i]t has not been a very time consuming case."

Union Pacific clearly believed that it would not be prejudiced by a dismissal without prejudice.

Third, the record does not support a finding of intentional delay or contumacious conduct. The district court's order stated that "[v]irtually no discovery has been done in this case." This

conclusion is wholly unsupported by the record. Mr. Woods, while proceeding *pro se*, answered the respondent's interrogatories and was deposed. He actively and successfully sought representation. With the assistance of counsel, Mr. Woods propounded interrogatories and conducted two depositions.

The discovery conducted in this case was very similar to the events in *Schilling v. Walworth County Park & Planning Commission*, 805 F.2d 272 (7th Cir. 1986). In *Schilling*, the plaintiff filed a *pro se* complaint on July 29, 1983. *Id.* at 273. The court ordered that discovery should be completed by June 1, 1984. Discovery was not completed by that date. The defendant complained of the plaintiff's refusal to be deposed. *Id.*

The plaintiff did answer interrogatories and sought representation, although unsuccessfully. *Id.* at 274. After the plaintiff failed to participate in a telephone status conference, the district court *sua sponte* dismissed with prejudice. *Id.*

The United States Court of Appeals for the Seventh Circuit reversed, because the district court's dismissal was an abuse of discretion. *Id.* at 276. The Court considered the facts that the plaintiff did answer interrogatories and did attempt to find counsel to be indicative of the plaintiff's intent to prosecute. *Id.* at 275-76. Also, the case was only sixteen months old. *Id.* "[D]ismissal predicated on the limited record of delay present here, without prior warning or explanation of inadequacy of lesser sanctions, is an abuse of discretion." *Id.*

In this case, Mr. Woods retained counsel and conducted discovery. Mr. Woods made numerous good faith attempts to prosecute his case. His conduct cannot be characterized as intentionally dilatory or contumacious. *See Cohen v. Carnival Cruise Lines, Inc.*, 782 F.2d 923, 925 (11th Cir. 1986)(no clear record of delay where the plaintiff attempted to retain counsel and did comply with some discovery requests).

Also, Mr. Woods's case was only fifteen months old when the district court dismissed with prejudice. "Especially when a case is still young, a district court must consider ... less drastic alternative sanctions before dismissing." *Schilling*, 805 F.2d at 277 (quoting *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir. 1981)). Consideration of less drastic alternative sanctions is the fourth factor to be examined in determining whether dismissal

is proper. The circuits are in agreement that district courts should consider alternative sanctions before dismissing with prejudice. *Enlace Mercantile Internacional v. Senior Industries*, 848 F.2d 315, 318 (1st Cir. 1988); *Guyer v. Beard*, 907 F.2d 1424, 1429 (3rd Cir. 1990); *McCargo v. Hedrick*, 545 F. 2d 393, 396 (4th Cir. 1976); *Boudwin v. Graystone Ins. Co., Ltd.*, 756 F. 2d 399, 401 (5th Cir. 1985); *Carter v. City of Memphis, Tennessee*, 636 F.2d 159, 161 (6th Cir. 1980); *Schilling v. Walworth County Park & Planning Commission*; 805 F.2d 272, 275 (7th Cir. 1986); *Pardee v. Stock*, 712 F.2d 1290,1292 (8th Cir. 1983); *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir. 1987); *Cohen v. Carnival Cruise Lines*, 782 F.2d 923, 925 (11th Cir. 1986).

In *Cohen*, the district court's failure to consider less drastic sanctions was an independent ground for reversing the order of dismissal. *Cohen*, 782 F.2d at 925. Consideration of alternatives is mandatory, not just recommended. *Id.* Also *see Hamilton*, 811 F.2d at 500 ("meaningful alternatives must be explored"); *Boudwin*, 756 F.2d at 401 ("the court must consider lesser sanctions"). When a district court's order gives no indication of consideration of alternative sanctions, a dismissal with prejudice cannot be sustained. *Cohen*, 782 F.2d at 925; *Hamilton*, 811 F.2d at 500.

In this case, the district court did not consider less drastic sanctions before dismissing Mr. Woods case with prejudice. The district court's order contains no discussion of possible alternatives. The order does not even suggest that

alternatives were considered but found lacking. The court could easily have followed Union Pacific's counsel's suggestion of assessing costs and expenses against Mr. Woods and then dismissed without prejudice.

The United States courts generally disfavor dismissal of cases with prejudice. *See Brown v. Frey*, 806 F.2d 801 (8th Cir. 1986); *Clayton v. White Hall School Dist.*, 778 F.2d 457 (8th Cir. 1985); *Jackson v. Schoemehl*, 788 F.2d 1296 (8th Cir. 1986); *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191 (8th Cir. 1976). The district court ignored all controlling precedent and applicable legal standards when it entered its order of dismissal with prejudice.

To dismiss with prejudice when no party to the action is seeking such a disposition constitutes abuse *per se*. This

Court should now take this opportunity to clarify this issue.

CONCLUSION

The district court clearly abused its discretion in this case. The record does not support a finding of contumacious conduct or intentional delay by Mr. Woods. Lesser alternative sanctions were not considered by the district court. Without first meeting these two requirements, a district court may not dismiss a case with prejudice.

Respectfully submitted,

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APPENDIX

-Trial Court's Order Dismissing Case With Prejudice, February 13, 1991 ..... A- 2

-Opinion of United States Court of Appeals for the Eighth Circuit, February 21, 1992 ..... A- 4

-Order Denying Rehearing, April 13, 1992 ..... A-11

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JERRY D. WOODS, Plaintiff,	)	
v.	)	No. 89-144-CV-W-3
	)	FILED FEB. 13, 1991
UNION PACIFIC RAILROAD COMPANY, Defendant.	)	

ORDER

The above captioned case was called for trial today. Plaintiff asks the Court for leave to file an amended complaint. Leave to file is DENIED because the amended complaint is untimely and good cause has not been shown to allow the untimely filing of the amended complaint.

Plaintiff moves the Court to dismiss this case without prejudice. Virtually no discovery has been done in this case. Exhibit lists and witness lists were not provided to Defendant nor the Court. Defendant has incurred approximately $2,000

in defending this suit and has expended approximately one hundred hours defending this suit. Plaintiff has attended two pretrial conferences with the Court and has been instructed to follow the local rules and to obtain the advice of counsel, in anticipation of the trial set for today. Plaintiff was not ready to go to trial today. Defendant was willing and ready to go to trial today.

Accordingly, it is hereby ORDERED that this case is DISMISSED WITH PREJUDICE.

It is further ORDERED that Plaintiff motion for leave to file an amended complaint is DENIED.

IT IS SO ORDERED.

Elmo B. Hunter
SENIOR U.S. DISTRICT JUDGE

Date 2-13-91

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1556

Jerry Woods, Appellant,	*	
v.	*	Appeal from the United States
Union Pacific Railroad Company,	*	District Court for the Western District of Missouri
Appellee.	*	

Submitted: January 8, 1992

Filed: February 21, 1992

Before JOHN R. GIBSON, BOWMAN, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

Jerry Woods appeals from the order of the District Court[1] dismissing his complaint with prejudice. We affirm.

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[1]The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri.

Woods filed a pro se complaint on December 8, 1989, alleging that Union Pacific wrongfully had discharged him from its employment in violation of Title VII. Union Pacific answered the complaint on December 22, 1989. On April 9, 1990, the District Court ordered a proposed scheduling order be submitted by May 11. On April 23, 1990, Union Pacific served Woods with a set of interrogatories and a request for production of documents. On May 23, Woods moved to extend the time for his response. The District Court extended Woods's time to answer the interrogatories and produce the documents to June 23, 1990. With the court's permission, a late proposed scheduling order was filed by Union Pacific on June 8. Also on that day, the court set a discovery scheduling order with a discovery deadline of September 4, 1990.

The court ordered Woods to meet with a Magistrate Judge[2] on September 6 to discuss Woods's problems with answering Union Pacific's deposition questions propounded to him on August 27. At that meeting, the Magistrate Judge informed Woods that Union Pacific's questions were proper and that the requested information was discoverable. On September 10, Union Pacific filed a proposed exhibit list and a proposed witness list. Woods filed a motion on September 11 to extend the deadline for the completion of discovery, which was denied by the District Court on September 21. Meanwhile, Woods failed to appear at a deposition scheduled for September 14. On October 3, the court ordered both parties to file a certificate

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[2]The Honorable John T. Maughmer, United States Magistrate Judge for the Western District of Missouri.

of completion of discovery by October 13. On October 17, the court ordered Woods to answer the questions asked of him at the August 27 deposition within five days or risk being "subject to sanctions, including, but not limited to, dismissal of his cause of action." Order of October 17, 1990, reprinted in appellant's Appendix at 5.

Six days later, Woods filed another motion to extend the deadline to complete discovery. This motion was denied by the District Court on October 29. On November 9, Woods filed yet another motion to extend the deadline to complete discovery. This motion was accompanied by a motion to have two attorneys entered as Woods's counsel, which was granted. A pretrial conference was held on December 3, after which the District Court granted the motion to extend the deadline for discovery to January 15,

1991, with the instruction that no further extensions would be granted. Another pretrial conference was held on February 1, 1991, just twelve days before the scheduled trial date. At this conference Woods's attorneys withdrew from the case. Woods was informed by the court that no further delays would be allowed, and that the trial would proceed as scheduled on February 13. On February 5, Union Pacific submitted an exhibit list, a witness list, proposed findings of fact and conclusions of law, and trial briefs. Union Pacific appeared on February 13, the scheduled first day of the trial, ready to proceed with the case, but a new attorney appeared for Woods and, with Woods not yet present despite the trial setting, moved to dismiss the case without prejudice. This was the proverbial last straw, as the District Court denied

the motion and dismissed the complaint with prejudice.

Although dismissing a case with prejudice is a severe sanction that should be taken sparingly, it is well within the District Court's discretion to dismiss a case with prejudice if there is a clear record of delay. DuBose v. Minnesota, 893 F.2d 169, 171 (8th Cir. 1990). Woods repeatedly missed deadlines and performed very little discovery. He filed no exhibit list or witness lists. Further, the court advised Woods on at least three occasions of his responsibility to conform to the local practice rules and of the desirability of retaining counsel. Finally, twelve days before the scheduled trial date, the court allowed Woods to change counsel on the understanding that the trial would proceed as scheduled. Woods personally had notice of the need to

conform to the court's schedule. We are satisfied that the dismissal of this case with prejudice does not unfairly punish Woods for the sins of his counsel, but instead is an appropriate sanction for Woods's failure to comply with the court's orders and his failure to prosecute his suit with anything approaching reasonable diligence.

In these circumstances, we cannot say the District Court abused its discretion in dismissing Woods's complaint with prejudice. Accordingly, the order of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1556WMKC

Jerry D. Woods, Appellant,	*
	*
v.	* Appeal from the
	* United States
Union Pacific Railroad Company,	* District Court for
	* the Western District
Appellee.	* of Missouri

The petition for rehearing by the panel is denied.

April 3, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit